

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JOSEPH SCHEIDLER, ET AL., :

4 Petitioners, :

5 v. : No. 04-1244

6 NATIONAL ORGANIZATION FOR WOMEN, :

7 INC., ET AL.; :

8 and :

9 OPERATION RESCUE, :

10 Petitioner, :

11 v. : No. 04-1352

12 NATIONAL ORGANIZATION FOR WOMEN, :

13 INC., ET AL. :

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15 Washington, D.C.

16 Wednesday, November 30, 2005

17 The above-entitled matter came on for oral

18 argument before the Supreme Court of the United States at

19 10:03 a.m.

20 APPEARANCES:

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22 Petitioners.

23 LISA S. BLATT, ESQ., Assistant to the Solicitor General,

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25 States, as amicus curiae, supporting the Petitioners.

1 ERWIN CHEMERINSKY, ESQ., Durham, N.C.; on behalf of the
2 Respondents.

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P R O C E E D I N G S

[10:03 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first today in Scheidler versus National Organization for Women, and Operation Rescue versus National Organization for Women.

Mr. Untereiner.

ORAL ARGUMENT OF ALAN UNTEREINER

ON BEHALF OF PETITIONERS

MR. UNTEREINER: Mr. Chief Justice, and may it please the Court:

In 2003, this Court, through all appearances, brought this case to an end by holding that all of predicate RICO counts found by the jury must be reversed, that the liability judgment must be reversed, and that the injunction must be vacated. On remand, however, a panel of the Seventh Circuit found a way to keep this case alive. It held that four of the 121 RICO predicates somehow survived this Court's decision, and it strongly suggested that the Hobbs Act punishes acts or threats of physical violence that have no connection to either robbery or extortion.

Today, we are asking this Court to reverse the erroneous decision below and remand with very explicit instructions that judgment be entered in favor of

1 Petitioners.

2 Reversal is warranted because of three separate
3 legal errors made by the Seventh Circuit. First, the
4 lower court failed to obey the clear holdings and remand
5 instructions of this Court. Second, the Seventh Circuit
6 erroneously held, in conflict with two other Circuits,
7 that the Hobbs Act plausibly can be read to cover
8 freestanding acts or threats of physical violence. And,
9 third, the Seventh Circuit erred in its previous decision,
10 in 2001, in holding that the racketeering law, RICO,
11 authorizes private injunctive relief.

12 JUSTICE O'CONNOR: Counsel, if we were to agree
13 with you on any one of the three questions, would that end
14 the case?

15 MR. UNTEREINER: That's correct, Justice
16 O'Connor. Because of what the Seventh Circuit also said,
17 that a new trial is not in the cards and the damages
18 verdict is gone and nothing more remains to be done except
19 for the two issues that it outlined, that's correct. If
20 the Court rules in our favor on any issue, the case is
21 over.

22 Let me turn to our first point. The Seventh
23 Circuit's decision is inconsistent with this Court's
24 previous holdings. This Court's 2003 opinion left no
25 doubt that, quote, "all," unquote, of the RICO predicates

1 must be reversed. But --

2 JUSTICE GINSBURG: Yes, but there was a theory
3 that was put to the jury -- and it's right there on the
4 special interrogatories -- one category was violent acts
5 that obstruct commerce with no connection at all to
6 extortion. That was there. And I have a question about
7 your characterization of what the Seventh Circuit did. It
8 was puzzled. It says, "Extortion, they all go." But here
9 are these four that don't involve extortion, and there's
10 no ruling from the Court on those. Was the Court supposed
11 to assume that the Court made a question -- decided a
12 question of statutory interpretation by silence?

13 MR. UNTEREINER: No. No, Justice Ginsburg, but
14 the argument was made in this Court, at the petition stage
15 the last time around, that those four counts were, in
16 fact, included in the petitions. At that time, of course,
17 there was no contrary authority. The Yankowski opinion of
18 the Ninth Circuit made clear, and I think the language of
19 the Hobbs Act makes clear, that freestanding acts or
20 threats of violence are not covered. So, we argued, at
21 the petition stage, that those counts were covered. And
22 then, at the merits stage, the Petitioners asked this
23 Court to reverse and remand for entry of judgment in our
24 favor on all claims and all counts. The Respondents, at
25 that point, did not argue --

1 JUSTICE STEVENS: Was there any argument on the
2 merits as to those four counts?

3 MR. UNTEREINER: No, Justice Stevens.

4 JUSTICE STEVENS: No. Yeah. Is it conceivable
5 that we overlooked that point?

6 MR. UNTEREINER: Well, we take the Court to mean
7 what it -- what it says.

8 JUSTICE STEVENS: But if I just -- do you think
9 it's conceivable that we just didn't realize those four
10 points were at issue?

11 MR. UNTEREINER: I think it's possible. But if
12 the Court did overlook those, I think that would have been
13 something that should have been raised in a rehearing
14 petition in this Court.

15 JUSTICE STEVENS: And do you think we resolved
16 the statutory construction issue that you're now arguing
17 very carefully at this time?

18 MR. UNTEREINER: There's no indication, in the
19 court's opinion, that it resolved it. It may have assumed
20 that we were right, because we made the argument at the --

21 JUSTICE STEVENS: They may assume it --

22 MR. UNTEREINER: -- petition stage --

23 JUSTICE STEVENS: -- but there's nothing in the
24 opinion to give any --

25 MR. UNTEREINER: That's correct. That's

1 correct, Justice Stevens.

2 JUSTICE O'CONNOR: If it's possible, at least,
3 that we just overlooked that aspect in the issuance of our
4 opinion, would it be more helpful to move on to the other
5 two questions at issue here, since they would be
6 determinative? It's --

7 MR. UNTEREINER: I'd be happy to --

8 JUSTICE O'CONNOR: -- it's disturbing to think
9 that some court below deliberately was trying to defy what
10 this Court said. And I'm not sure there is any indication
11 of that. It may have thought that those issues -- those
12 other acts were overlooked, and, therefore, they had some
13 right to deal with it. But I wonder if we shouldn't focus
14 on the other two legal issues here.

15 MR. UNTEREINER: I'd be happy to move on,
16 Justice O'Connor, to those two issues.

17 Our second argument is that the Hobbs Act does
18 not punish freestanding acts or threats of violence. By
19 "freestanding," we mean unconnected to either robbery or
20 extortion. And I think that's apparent from the language
21 of the Hobbs Act, which has three clauses. And the third
22 clause covers acts or threats of violence, quote, "in
23 furtherance of any plan or purpose to do anything in
24 violation of this section," unquote. So, there needs to
25 be a connection. There needs to be a violation of this

1 section. And our position is that that refers back to the
2 principal offenses under section 1951, robbery or
3 extortion.

4 Now, the Respondent's position is that the mere
5 act of obstructing commerce, or affecting commerce, or, I
6 suppose, even delaying commerce, is a violation of the
7 Hobbs Act. And I don't think it's possible to read the
8 statutory language that way. So, we think that argument
9 is clearly foreclosed. Now, if there's any doubt about
10 that, based on the language of the Hobbs Act, as amended
11 in 1948, one need only look back to the 1946 version of
12 the Hobbs Act, as originally passed. And there, it --
13 there's no debate that Congress intended to cover acts or
14 threats of physical violence only if undertaken in
15 furtherance of a plan or purpose to commit robbery or
16 extortion.

17 So, Respondent's position rises or falls on the
18 proposition that in 1948, when Congress recodified and
19 revised all of Title 18 of the U.S. Code, it dramatically
20 expanded the Hobbs Act. This Court, in reviewing revision
21 and recodification statutes, applies special rules of
22 construction. It requires the clear statement -- or clear
23 expression of intent to make a substantive change; and, if
24 there isn't one, it assumes that no substantive change was
25 intended.

1 If you look at the revisor's notes to section
2 1951(a) in the 1948 revision, it's clear that there is no
3 intent to make any substantive change. So, I think the
4 Court really doesn't need to go any further on that second
5 issue to rule in the Petitioner's favor.

6 JUSTICE GINSBURG: The question is whether the
7 Court should rule on it, as in a matter of first decision.
8 We are a court of review. There was no determination of
9 whether the Hobbs Act included such a category in the
10 Seventh Circuit. So, the difficulty, the impediment to
11 addressing your position is that however strong it may be,
12 it wasn't resolved below, so why shouldn't we follow the
13 natural order that first the District Court speaks, and
14 then the Court of Appeals, and then it comes here?

15 MR. UNTEREINER: Justice Ginsburg, I understand
16 the concern, but the Seventh Circuit did everything but
17 resolve the issue. It says it was resolving the issue,
18 but it -- at the same time, it said that it rejected our
19 argument based on the rule of lenity. It rejected our
20 argument based on the over-federalization of State crimes.
21 It said that both -- it rejected our plain-language
22 argument. It went on and on to reject all the same
23 arguments we're making in this Court.

24 So, I think if the case were remanded to the
25 District Court --

1 JUSTICE SCALIA: Excuse me. How could the --
2 how could the Court of Appeals not have resolved this
3 issue? How could it possibly have rendered its judgment
4 without resolving this issue?

5 MR. UNTEREINER: Well, what the -- what the
6 Court --

7 JUSTICE SCALIA: Did you raise this issue below?

8 MR. UNTEREINER: Yes, we did, Your Honor. We
9 raised it both in the -- at the rehearing petitions in the
10 Seventh Circuit and in the initial appeal. It did resolve
11 the issue, insofar as it held that the Hobbs Act may
12 plausibly be read to cover freestanding acts for threats
13 of violence. And that holding is in conflict with the
14 decision of the Ninth Circuit and the Sixth Circuit.

15 JUSTICE SCALIA: Excuse me. Is that how we
16 apply statutes, that if they may plausibly be read a
17 certain way, that's what they mean?

18 MR. UNTEREINER: Well, that is what the --

19 JUSTICE SCALIA: I don't understand how that's a
20 resolution of the question.

21 MR. UNTEREINER: The Seventh Circuit went out of
22 its way to say it was not finally resolving the question.
23 But, Justice Scalia, it, again and again, went through
24 our arguments and rejected them. And then, at the end of
25 its opinion, it said it would be better to read the

1 statute at -- take the statute at face value, and that, it
2 suggests, was what Respondent's position was. So, I think
3 it went as far as it possibly could to resolve the
4 question and reject all of the arguments that are being
5 made here. So, I think it -- to go back to the District
6 Court, it would be a foregone conclusion, and it would
7 just result in further delay. This case has gone on for
8 almost --

9 JUSTICE KENNEDY: Well, I'm with you --

10 MR. UNTEREINER: -- 20 years.

11 JUSTICE KENNEDY: -- up to the point where you
12 say it went as far as it possibly could. As Justice
13 Scalia indicates, why didn't it say, "This is the way the
14 Act must be interpreted," period? So, it didn't go as far
15 as -- I'm just quibbling with your -- I'm just quibbling
16 with your statement that it went as far as it possibly
17 could. I don't think it did. That's the problem.

18 MR. UNTEREINER: Well, yes, it did leave open
19 the possibility that a court might come to the opposite
20 conclusion. But I think if you're the District Court
21 reading the opinion of the Seventh Circuit, I think it's
22 clear which way you're going to have to come out.

23 JUSTICE GINSBURG: Why?

24 JUSTICE KENNEDY: We got you off of --

25 JUSTICE GINSBURG: Were you --

1 JUSTICE KENNEDY: We got you off of your first
2 point, but I'd like to just loop back to that for a
3 minute, at this point. Is this imprecision, this
4 ambiguity, grounds for our reading -- our insisting on
5 reading our earlier remand and judgment literally and
6 saying that there are no predicate acts -- there are no
7 predicate acts that support this judgment?

8 MR. UNTEREINER: Well --

9 JUSTICE KENNEDY: Do -- is there some prudential
10 argument for us not to reach this issue and just insist on
11 the wording of our earlier mandate?

12 MR. UNTEREINER: The Court could certainly come
13 out that way on prudential grounds as a reason to avoid
14 deciding a Hobbs Act issue. But, in our view, the Hobbs
15 Act question is a fairly easy and straightforward one.
16 And the Seventh Circuit's opinion is going to create
17 mischief if left untouched.

18 JUSTICE GINSBURG: I'm concerned about your
19 characterization, not only of suggesting that there was
20 some attempt to force a particular decision, but I'm
21 reading the Seventh Circuit's remand to the District
22 Court. It went through your argument, which it said was a
23 substantial one, that no change was intended in the
24 codification. And it said, "While these revisions were
25 intended to be formal stylistic changes, it is not beyond

1 the realm of the possible that the revisors may have made
2 certain substantive changes." That doesn't sound like
3 they were ruling on it definitively, but they were tipping
4 their hand. "Not beyond the realm of the possible." That
5 was --

6 MR. UNTEREINER: The Seventh Circuit did
7 everything it could to make it seem like a plausible
8 issue, as opposed to a very clear issue that should be
9 resolved in our favor. It went out of its way to do that.

10 JUSTICE SCALIA: I don't understand how they --
11 how they could dispose of the case without resolving that.
12 That's my puzzlement.

13 MR. UNTEREINER: Well --

14 JUSTICE SCALIA: How -- I mean, can we do that
15 in a case that comes up here, and just say, "There are
16 good arguments on both sides, it's quite plausible," and
17 remand the case without resolving the issue?

18 [Laughter.]

19 JUSTICE GINSBURG: They asked the District Court
20 to resolve it. They said the District Court should
21 resolve it in the first instance, and then they would
22 review it, presumably.

23 MR. UNTEREINER: That's right, Justice Ginsburg.

24 But I do think a premise of the remand for further
25 proceedings in the District Court is that it's plausible

1 to read the statute this way. And I think the Court
2 could, and should, reverse that aspect of the Seventh
3 Circuit's decision.

4 JUSTICE STEVENS: Of course, the reason they
5 said it was plausible is that -- and you may well be
6 right, on the bottom line, and the Government agrees with
7 you, but there are -- there's a redundancy in the statute.
8 There's a phrase in there that could be taken out, and
9 the statute would have exactly the same meaning, if you're
10 correct.

11 MR. UNTEREINER: We don't agree that there --
12 well, perhaps Your Honor could elucidate --

13 JUSTICE STEVENS: It seems to me those words --
14 I forget what the -- "commit threats of physical
15 violence." So, take those words. The statute will have
16 the same meaning.

17 MR. UNTEREINER: I don't think that's right. I
18 don't think that's right --

19 JUSTICE STEVENS: Oh, really?

20 MR. UNTEREINER: -- Justice Stevens. I think
21 that that does add something. The argument is being made
22 in this case that those words are superfluous under our
23 reading, but I don't think that's correct.

24 JUSTICE STEVENS: What function do they perform?
25 What case would it cover that would not otherwise be

1 covered?

2 MR. UNTEREINER: It would cover preparatory acts
3 of violence that do not rise to an attempt. We gave
4 several examples --

5 JUSTICE STEVENS: That do not rise to an
6 obtaining?

7 MR. UNTEREINER: No, do not rise to an attempt,
8 an attempted extortion or robbery. The example we gave --
9 we gave several examples in our blue brief. One of them
10 is a defendant who wants to rob a factory and --

11 JUSTICE STEVENS: Oh, I see what you're saying.

12 MR. UNTEREINER: -- and --

13 JUSTICE STEVENS: You're -- I understand.

14 MR. UNTEREINER: Yes. Yes.

15 If I may, I'd like to turn, in my limited time,
16 to the third question, which is the -- whether RICO
17 authorizes private injunctive relief. And we want to make
18 three basic -- or I'd like to make three basic --

19 CHIEF JUSTICE ROBERTS: No, we didn't reach
20 that, last time.

21 MR. UNTEREINER: That's correct, Mr. Chief
22 Justice.

23 CHIEF JUSTICE ROBERTS: Why, if we -- if we
24 agree with you on the Hobbs Act, I assume you would not
25 have us reach that third question this time, either.

1 MR. UNTEREINER: That's correct, there would be
2 no need for the Court to reach that issue this time,
3 either.

4 But I'd like to just say a few words about that
5 provision, because I think we're right on that issue, as
6 well. And the Court can pick any one of these three
7 grounds to rule in our favor. We'd be happy with any of
8 them.

9 Our principal argument on RICO is that RICO's
10 civil-remedies provisions were drawn from the antitrust
11 laws, from the Clayton Act and from the Sherman Act before
12 it. In fact, the treble-damages provision of RICO is
13 taken almost verbatim from the Clayton Act and Sherman Act
14 provisions. This Court, in a long line of cases, held
15 that the Sherman Act does not authorize private injunctive
16 relief. And that holding -- those holdings were based on
17 the provisions on which these RICO remedial provisions
18 were modeled. And so, we think when Congress took that
19 language, which is essentially identical, at least in the
20 -- in the -- in the treble-damages provision, from the
21 antitrust laws, that it was entitled to assume that they
22 would be read the same way in RICO.

23 JUSTICE STEVENS: But, of course, at the time
24 they did that, the Clayton Act had already been passed.

25 MR. UNTEREINER: That's true, Justice Stevens.

1 But I think those provisions were carried forward, and
2 Congress -- and this Court's cases, again and again, have
3 relied on Congress's use of the -- of the Clayton and
4 Sherman Act models. You've said that's a dominant strand
5 in the legislative history.

6 CHIEF JUSTICE ROBERTS: Your argument's a little
7 inconsistent with the Franklin case, though.

8 MR. UNTEREINER: I'm sorry.

9 CHIEF JUSTICE ROBERTS: Gwinnett -- Franklin
10 versus Gwinnett County.

11 MR. UNTEREINER: Mr. Chief Justice, we think
12 that Franklin is distinguishable. There are two lines of
13 this Court's cases. Franklin falls into one line. That's
14 a case where this Court finds a -- or acknowledges a
15 private right of action, but where, necessarily, there's
16 no guidance from Congress of what the remedies are. And
17 in that situation, the Court does apply a presumption that
18 all available remedies are -- will be -- will be imputed.

19 In this -- in the second line of cases, which is
20 what this case is all about, Congress sets forth a
21 detailed remedial scheme. And in those cases, I think
22 it's inappropriate -- and this Court has said that
23 repeatedly -- for courts to add remedies to those schemes
24 which Congress is -- has selected. Now, this is
25 especially true in this case, because Congress relied on

1 those antitrust precursors. And, beyond that, section 16
2 of the Clayton Act, which expressly authorizes private
3 injunctive relief, is -- has no analog in RICO. Now,
4 Congress thought about including a provision like section
5 16 of the Clayton Act when it considered RICO. Again and
6 again, proposals were made, but Congress did not adopt
7 those proposals either during the consideration of RICO or
8 shortly thereafter.

9 If there are no further questions, I'd like to
10 reserve the balance of my time for rebuttal.

11 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

12 Ms. Blatt.

13 ORAL ARGUMENT OF LISA S. BLATT

14 FOR UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONERS

16 MS. BLATT: Thank you, Mr. Chief Justice, and
17 may it please the Court:

18 It is the position of the United States that the
19 physical-violence clause of the Hobbs Act requires an
20 intended robbery or extortion, and that private parties,
21 under RICO, cannot obtain injunctive relief.

22 JUSTICE STEVENS: Would you not --

23 JUSTICE O'CONNOR: Would you tell us what --
24 which one of these questions, in your view, we ought to
25 address, first and foremost? If the answer to any of them

1 is favorable to Petitioner's position, I guess that's the
2 end of the case.

3 MS. BLATT: That's right. We think what would
4 be appropriate is to recognize that the -- this Court's
5 decision last time around did contain a sweeping statement
6 at the end that all the predicate acts must be reversed.
7 At the same time, the issue of the physical-violence
8 clause was not briefed by the parties, it was not
9 discussed in this Court's opinion, it was not discussed in
10 the Seventh Circuit's opinion. And "law of the case" type
11 principles are discretionary, and this Court has the
12 discretion to reach the two other issues in the case.

13 Now, the RICO issue is more squarely presented,
14 because there's an actual holding by the Seventh Circuit
15 on that point. It's also an issue on which the Circuits
16 are divided. It's important and recurring, and it's been
17 before this Court twice. At the same time, the Court also
18 has discretion to clean up, or clarify, the Hobbs Act
19 issue. There was a remand. And although there's no
20 holding by the Seventh Circuit, there was a remand that
21 was predicated and based on an assumption that the
22 plaintiffs had raised at least a substantial question.
23 And this Court has discretion to say that was an error of
24 law, because, under the plain language, the physical-
25 violence clause is linked to robbery or extortion. That's

1 plain on the statute, because it requires that the
2 physical violence be in furtherance of a violation.

3 JUSTICE GINSBURG: Even though two U.S.
4 attorneys, years back, did predicate cases on there being
5 a discrete crime of obstructing commerce through violent
6 means.

7 MS. BLATT: That's correct. And those
8 prosecutions were inconsistent with the written guidance
9 of the Department of Justice in a longstanding
10 interpretation of the Hobbs Act, at least since 1965, that
11 it required an intended robbery or extortion.

12 JUSTICE STEVENS: Ms. Blatt --

13 MS. BLATT: And --

14 JUSTICE STEVENS: -- can I identify a concern?
15 I'd like you to help me out on it. I -- that language, if
16 you construe it the way the other side does, it would
17 cover certain violent conspiracies that would merely
18 obstruct interstate commerce that we could all be
19 concerned about today. Are there other criminal statutes
20 on the book that fill that gap?

21 MS. BLATT: Yes. 18 U.S.C. 2332(b), subsection
22 (g), is a laundry list of Federal statutes, and it's a
23 good source of reference for the type of Federal statutes
24 that cover violence where there's a distinct Federal
25 interest.

1 JUSTICE STEVENS: So that you're saying, in
2 substance, that you don't need to read the Hobbs Act the
3 way they do in order to protect the public from the kind
4 of harms that the -- they would read the statute as
5 covering.

6 MS. BLATT: That's correct. There's a lot of
7 statutes on the books that apply to bombing in public
8 places, violence against communication facilities,
9 computer, transportation, energy, airports, any kind of
10 mass transportation. And that -- 18 USC 2332 -- it's a
11 long list of statutes. There's also the arson statute and
12 the bombing statute, the use of any explosives in a -- in
13 a -- in a facility that's used in interstate commerce.

14 And the Government has brought thousands and
15 thousands and thousands of Hobbs Act prosecutions, and,
16 but for those two, the only two that we can identify, all
17 of our prosecutions have been linked to robbery or
18 extortion.

19 And if I could address the superfluous point, we
20 don't think the clause is superfluous either, for two
21 reasons. It applies to a defendant who injures innocent
22 bystanders during a robbery. Now, the defendant has
23 committed the crime of robbery, but he's also committed
24 the separate crime of using violence against any person in
25 furtherance of that robbery. So, there could be

1 cumulative punishment based on that offense, and there
2 would be --

3 JUSTICE KENNEDY: What do you mean? It's a
4 separate --

5 MS. BLATT: -- two separate offenses.

6 JUSTICE KENNEDY: -- a separate offense?

7 MS. BLATT: It's a separate offense for --

8 JUSTICE KENNEDY: So you charge two counts for
9 violating the same section?

10 MS. BLATT: Yes, because there's two distinct
11 harms. There's not only the business, as the victim of
12 the robbery, but there's the innocent bystanders who were
13 injured or killed during the course of that robbery, and
14 that would be two separate -- and then there's another way
15 it's not --

16 JUSTICE KENNEDY: Two separate violations, each
17 of which violates the same statute?

18 MS. BLATT: Yes, that's right.

19 JUSTICE BREYER: Is it -- you just -- on your
20 list, I had the impression, but tell me if I'm right or
21 wrong, that there's a specific statute dealing with
22 abortion clinics now, though there wasn't when this case
23 began.

24 MS. BLATT: Yes, the --

25 JUSTICE BREYER: So that if --

1 MS. BLATT: -- FACE Act.

2 JUSTICE BREYER: -- Operation Rescue did the
3 same kind of thing now that they did then, the Petitioners
4 in -- the plaintiffs in this case would be able to get
5 relief under that statute. Is that right or wrong?

6 MS. BLATT: That's absolutely correct. The FACE
7 Act, which was passed in 1994, gives private parties a
8 right for damages and injunctive relief for blocking
9 access to clinics. That would -- that would cover this
10 specific case, and then there's the more general statutes
11 I was speaking about earlier. But there is a specific
12 right to injunctive relief, and I think the plaintiffs in
13 this case tried to add claims under the FACE Act, but they
14 were -- they were denied the ability to do that.

15 The second way it's not superfluous is the
16 example given by Petitioners, in that it applies to a
17 defendant, for instance, who tries to enlist another
18 person in a robbery, but the neighbor, or the -- excuse
19 me, that person just refuses. The physical-violence
20 clause would apply to that situation regardless of whether
21 that conduct also qualifies as an attempt.

22 JUSTICE GINSBURG: Ms. Blatt, your time is
23 almost over, so, on the injunction part, what remedies are
24 available to the United States under your reading of the
25 provision? Injunctive relief, yes. What about -- is

1 there any monetary relief that the United States can seek
2 under RICO?

3 MS. BLATT: Well, 1964(a) addresses equitable
4 relief, and the Government can get things like
5 disgorgement under (a). But as far as damages are
6 concerned --

7 JUSTICE GINSBURG: Yes.

8 MS. BLATT: -- no. This Court held, in the
9 Cooper case, which is an antitrust case that was talked
10 about in the Flamingo decision recently, the United States
11 is not a person who is able to sue under the antitrust
12 laws, because -- the general background principle that the
13 United States is not a person. And we think it's highly
14 relevant that, after this Court repeatedly held that
15 private parties cannot get injunctive relief, that the
16 United States cannot get damages under the antitrust,
17 Congress, in the Clayton Act, passed two express
18 provisions of Government damages action -- that was in
19 1955, and now it's a treble-damages action -- as well as
20 an express private injunctive action. And, thus, there
21 was this menu of remedies in the antitrust laws of express
22 Government equitable, express Government damages, express
23 private treble damages, and then Government damages. But
24 Congress, in RICO, only picked up two of them. It picked
25 up an express, a right for the attorney general to seek

1 injunctive relief and other equitable relief, and it
2 picked up an express right for private parties only to
3 seek treble damages.

4 In light of the holding after holding after
5 holding, we identified six cases that were -- that were
6 rendered before the passage of RICO, and the Cooper
7 decision, which said the Government cannot seek damages.
8 We think it's very clear that when Congress borrowed from
9 the antitrust laws, but did not pick up those two express
10 rights, that the governing principle is that when Congress
11 borrows a statute that's been definitively construed,
12 Congress adopts that judicial construction along with the
13 statute. And it's particularly relevant because of those
14 two express provisions.

15 And RICO is -- just contains that structure that
16 was there in the Sherman Act, with the express public
17 equitable action and the express private treble-damages
18 action.

19 If there are no question, we'd ask the Court to,
20 if it wants, to reach --

21 JUSTICE KENNEDY: I have -- just have one
22 question. If we were to adopt the Petitioner's first
23 suggestion that we should simply have a strict reading of
24 our mandate, would that cause problems, so far as people
25 interpreting our precedent and indicating that, by

1 implication, we've reached this Hobbs Act question?

2 MS. BLATT: No, I don't think so. I think in
3 the -- I don't think so. The Court could apply just
4 straightforward "law of the case" principles and say,
5 "Regardless of whether we actually reached the four
6 predicate acts, our judgment spoke clearly that the
7 injunction had to be vacated."

8 JUSTICE STEVENS: Regardless of whether we knew
9 what we were doing, we said it.

10 [Laughter.]

11 MS. BLATT: And that's why we think it's
12 appropriate for the Court to say, just like the Court did
13 in the recent per curiam Eberhart, that generally courts
14 are supposed to follow this Court's mandates, and they're
15 supposed to articulate their concerns to facilitate
16 resolution by this Court, and then leave it up to this
17 Court to clarify an earlier decision.

18 JUSTICE SCALIA: Except if they think we didn't
19 know what we were doing. I --

20 MS. BLATT: I think that --

21 JUSTICE SCALIA: -- they ignore it if they -- if
22 they think that we didn't know what we were doing.

23 MS. BLATT: Well, they could have --

24 JUSTICE STEVENS: Only when it's perfectly clear
25 that we didn't know it.

1 [Laughter.]

2 MS. BLATT: We do think that the judgment did
3 sweep more broadly than the circumstances --

4 JUSTICE STEVENS: You don't think there's even
5 an arguable basis for saying we resolved the statutory
6 question that's presented now, do you?

7 MS. BLATT: No, because usually the Court
8 doesn't decide important -- the construction of a Federal
9 statute, a Federal criminal statute, without discussing
10 it. It was -- I don't want to say "buried in footnotes,"
11 but it was mentioned in the footnotes at the petition
12 stage the second time around, and then it dropped out of
13 the case. And even the United States didn't discuss it --

14 JUSTICE STEVENS: But it's not mentioned in the
15 opinion.

16 MS. BLATT: It's not mentioned in the opinion.
17 It's not mentioned in the briefs, at the merits stage. It
18 was not mentioned by the Seventh Circuit. At the same
19 time, the court, at the end, did say that all of the
20 predicate acts had to be reversed.

21 Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you, Ms. Blatt.
23 Mr. Chemerinsky.

24 ORAL ARGUMENT OF ERWIN CHEMERINSKY

25 ON BEHALF OF THE RESPONDENTS

1 MR. CHEMERINSKY: Good morning, Mr. Chief
2 Justice, and may it please the Court:

3 The Seventh Circuit did exactly the right thing
4 in this case. It sent the case back to the District Court
5 and asked the District Court to determine whether an
6 injunction could remain, based on the four counts of
7 physical violence and threats of violence, and asked the
8 District Court to determine whether or not the Hobbs Act
9 applies to physical violence and threats of violence apart
10 from extortion and robbery. This made great sense. No
11 court, in this long litigation, had yet discussed the
12 meaning of the Hobbs Act and whether it applies to
13 physical violence and threats of violence apart from
14 extortion and robbery.

15 There's already been a good deal of discussion
16 about what this Court meant in its prior decision. I
17 think you find clarification if you look at page 399 of
18 your prior decision, where the Court lists the predicate
19 acts that it was considering. And if you add up the
20 numbers, it adds to 117 predicate acts, but if you go to
21 the jury's verdict, the special interrogatories, they
22 found 121 acts. What was omitted from the Supreme Court's
23 listing last time were the four counts of physical
24 violence and threats of violence in violation of the Hobbs
25 Act.

1 JUSTICE SOUTER: Well, that's true, but don't
2 you have the further difficulty that we didn't nearly
3 reverse with respect to the -- to the Hobbs Act
4 violations, or to the listed ones. We made it clear. We
5 said, expressly, that the judgment had to be reversed,
6 which seems to sweep everything within it, doesn't it?

7 MR. CHEMERINSKY: No, Your Honor. What this
8 Court did was reverse and remand for further
9 consideration, consistent with the decision of this Court.
10 Since this Court had not considered the --

11 JUSTICE SOUTER: But, I mean, that's what we
12 always say. And it may be that there is absolutely
13 nothing to do, at that point, except enter judgment for
14 one side and be done with it.

15 MR. CHEMERINSKY: But this Court has been clear
16 that it only decides the issues that it speaks to. It's
17 not plausible, Your Honor, that this Court was deciding a
18 major unresolved issue of Federal criminal law without
19 ever speaking to the question --

20 JUSTICE SOUTER: Well, I think -- I think, you
21 know, your argument is fine, but the trouble is, if the
22 question is, "Did the Seventh Circuit honor the judgment
23 of this Court?" I think there's a pretty good argument
24 that it not -- that it did not, based upon the fact that
25 we, in effect, summed up everything we were purporting to

1 say with the phrase that the judgment itself had to be
2 reversed.

3 MR. CHEMERINSKY: Except, Your Honor, this Court
4 has said that it doesn't decide issues that weren't
5 presented to it. And if you look at page 397 --

6 JUSTICE SCALIA: He's not talking about the
7 deciding of issues; he's talking about reversing a
8 judgment. You don't have to go into what the issues are
9 in order to follow that instruction. The judgment is
10 reversed. And if there were issues that should have been
11 resolved in order to reverse the judgment, and that
12 weren't, it would seem to me that your remedy would not be
13 to say to the Court of Appeals, "Well, the Supreme Court
14 didn't mean what it said," or, "didn't know what it was
15 doing," but, rather, to move for reconsideration here.

16 MR. CHEMERINSKY: No, Your Honor. Rehearing is
17 to issues that were decided by this Court. This Court
18 clearly did not speak to the meaning of the Hobbs Act.
19 And so, it was completely appropriate for the Seventh
20 Circuit to say that this Court considered the issues, in
21 terms of what extortion was about, whether the injunction
22 is permissible under civil RICO. If you look at the --

23 JUSTICE SCALIA: Are you saying you couldn't --
24 you couldn't file a motion for rehearing on the ground
25 that the Court neglected to address four points that were

1 made very -- you made nothing of them in the -- in the
2 argument or in the briefs. It was almost not considered
3 at all. Do you mean that when a judgment is issued that
4 is so clearly, in your view, erroneous, you can't come to
5 the Court and say, "The judgment is erroneous, you forgot
6 to address these issues"? I hope you can do that in a
7 motion for rehearing.

8 MR. CHEMERINSKY: But, Your Honor, it's not
9 required to present it that way. And I think what's
10 incorrect about your phrasing is, it was Petitioners that
11 did not present this. It was the same Petitioners last
12 time. They presented to this Court the questions as to
13 the meaning of "extortion" and whether injunctions were
14 permissible under civil RICO. In fact, if you look at
15 page 397 of your prior decision, it clearly states that
16 there were two issues presented, what "extortion" means
17 under the Hobbs Act and whether injunctions are
18 permissible under civil RICO. I think it was completely
19 appropriate, then, for Respondents to say this Court
20 didn't deal with the four issues in -- concerning whether
21 violence and threats of violence are separately from the
22 Hobbs Act. And it was then permissible to say to the
23 Seventh Circuit, "These remain as a basis for relief."

24 JUSTICE SCALIA: They would have to say not just
25 that. They would have to say, "The court did not deal

1 with those four issues, and, therefore, its judgment was
2 erroneous." They would have to say that in order to -- in
3 order to act the way they did --

4 MR. CHEMERINSKY: Your Honor --

5 JUSTICE SCALIA: -- because our judgment was
6 "reverse."

7 MR. CHEMERINSKY: Your Honor, if this Court had
8 entered judgment for Petitioners, which it could have,
9 then you would be correct. But, instead, what this Court
10 did, as I said, is reverse and remand for consideration.
11 And the Seventh Circuit --

12 CHIEF JUSTICE ROBERTS: Do we look -- do we --
13 do we typically enter judgment, ourselves?

14 MR. CHEMERINSKY: No, typically you don't. But
15 it is certainly permissible and possible for this Court to
16 do so.

17 CHIEF JUSTICE ROBERTS: When was the last time
18 we did that?

19 MR. CHEMERINSKY: I don't know the answer to
20 that, Your Honor, other than, of course, as a court, this
21 Court obviously could enter judgment for Petitioners. The
22 fact that this Court said --

23 JUSTICE STEVENS: Well, I don't think we would
24 actually enter judgment. We'd -- we might reverse with
25 instructions to have the lower court enter judgment, but

1 we wouldn't enter the judgment ourselves.

2 MR. CHEMERINSKY: Your Honor, the Court could
3 certainly, and, more likely, would do what you say. It
4 could also affect the judgment --

5 JUSTICE STEVENS: The mandate, in this case,
6 remanded, is that what you --

7 MR. CHEMERINSKY: That's correct, Your Honor.

8 JUSTICE STEVENS: So further proceedings --

9 MR. CHEMERINSKY: That's right.

10 JUSTICE STEVENS: -- consistent with the
11 opinion.

12 MR. CHEMERINSKY: And my only point is, since
13 this Court clearly said it was dealing with 117 of the
14 acts, and clearly did not mention the four counts of
15 violence and threats of violence under the Hobbs Act --

16 CHIEF JUSTICE ROBERTS: Well, it also said, in
17 the last paragraph, "all of the predicate acts supporting
18 the jury's verdict."

19 MR. CHEMERINSKY: That's right. And the
20 question, of course, is, What does "all" refer to here?
21 And I would say, if you go back to page 399, it lists the
22 predicate acts that it's referring to and there --

23 CHIEF JUSTICE ROBERTS: No, it says --

24 MR. CHEMERINSKY: -- 117 --

25 CHIEF JUSTICE ROBERTS: -- "all the predicate

1 acts supporting the jury's finding of a RICO violation."

2 MR. CHEMERINSKY: But, Your Honor --

3 CHIEF JUSTICE ROBERTS: So, it's quite clear
4 what "all" was referring to.

5 MR. CHEMERINSKY: But, Chief Justice Roberts,
6 then the assumption would have to be that this Court was
7 deciding the four counts, in terms of violence and threats
8 of violence, even though it wasn't presented in the cert
9 petition, even though it wasn't briefed, and even though
10 it was never discussed in this Court's opinion. And I
11 think it was quite logical for the Seventh Circuit to say
12 the appropriate thing to do is to let the District Court
13 decide whether any injunctive relief was appropriate,
14 based on those four counts; and, if so, what that
15 provision of the Hobbs Act means.

16 JUSTICE GINSBURG: Mr. Chemerinsky, if we turn
17 from what this Court did, or did not, think about last
18 time around to what those four counts were, would I look
19 to find out what were those four acts of violence that
20 remain in the case? I could not find, in any of the
21 papers before us, any specific definition of what those
22 acts of violence were. I mean, the jury was given -- I
23 don't know what -- was it a dozen possibilities? And they
24 found four. But which four, we have no idea.

25 MR. CHEMERINSKY: But, Your Honor, that would be

1 a reason why this case should go back to the District
2 Court, because that's the judge who tried the case.

3 JUSTICE GINSBURG: But he -- but wasn't this
4 tried to a jury? That was a jury that made those
5 findings.

6 MR. CHEMERINSKY: Yes --

7 JUSTICE GINSBURG: And the jury is no longer
8 sitting.

9 MR. CHEMERINSKY: But the judge presided over
10 the jury trial, and the judge could identify if there were
11 four acts of violence and threats of violence to obstruct
12 interstate commerce.

13 JUSTICE GINSBURG: He knows that there were four
14 acts. He knows that he -- under his instructions, the
15 jury could pick 12. How could he know which four the jury
16 homed in on?

17 MR. CHEMERINSKY: But, Justice Ginsburg, he
18 doesn't need to know which four. What he needs to
19 determine is, Did the record that was presented to the
20 jury support the finding that there were four acts of
21 violence and threats of violence? And we'd suggest that
22 --

23 JUSTICE GINSBURG: But does it -- when what
24 turns on that finding is injunctive relief, the judge
25 might very well be influenced by what those particular

1 acts were. He might say one set of four was not adequate
2 to issue this injunction, but another set of four would
3 be. And we just don't know -- we don't know what those
4 acts were. The jury is not to be called back. The
5 Seventh Circuit said "no more evidence." So, if we get
6 down to those four acts, how can we say those are
7 sufficient to uphold an injunction, when we don't even
8 know what the acts were?

9 MR. CHEMERINSKY: But the traditional rule is to
10 interpret the jury's verdict in a way that's most
11 favorable to its conclusion. And so, here what the judge
12 has to decide is, based on the record, were there four
13 acts of violence or threats of violence to obstruct
14 interstate commerce? And we'd suggest it would be quite
15 easy for the judge to identify four such acts.

16 JUSTICE SCALIA: Well, you say "most favorable
17 to its conclusion," but did the jury conclude that there
18 should be an injunction?

19 MR. CHEMERINSKY: No, of course, but --

20 JUSTICE SCALIA: That's up to the judge.

21 MR. CHEMERINSKY: -- but the jury --

22 JUSTICE SCALIA: So, I mean, the principle that
23 you interpret a verdict in the manner most favorable to
24 its conclusion has no application here at all.

25 MR. CHEMERINSKY: But, Your Honor, the jury did

1 find, in special interrogatory 4(e), that there was
2 violence and threats of violence and if -- to obstruct
3 interstate commerce.

4 Also here, remember the judge held a separate
5 hearing after the jury verdict, before issuing injunction.

6 And if, on the basis of the evidence that he heard during
7 the trial in that special hearing, he found four acts of
8 violence and threats of violence, he then has to decide
9 what injunctive relief is appropriate. And, of course, he
10 would also, consistent --

11 JUSTICE SCALIA: Excuse me. You mean it's up --
12 I don't understand that. The judge, in order to issue the
13 injunction, becomes a second factfinder, and he can find
14 four -- he can pick four out of the twelve, perhaps four
15 that the jury had not picked?

16 MR. CHEMERINSKY: Your Honor, since this is an
17 injunction, he is allowed to consider the evidence that he
18 heard, since he was sitting in an equitable matter. And
19 so, there were actually two presentations --

20 JUSTICE SCALIA: So, he can -- he can actually
21 make a finding. And it -- and it could be that the jury
22 found that eight of them weren't valid, and the judge, in
23 order to issue an injunction, can contradict the jury and
24 say, "You know, I find that other four"?

25 MR. CHEMERINSKY: Well, when it comes to

1 injunctive relief, the judge can hold a separate hearing,
2 and that's exactly what happened here. And I believe the
3 issue for the judge on remand would be, Were there four
4 acts of violence or threats of violence to obstruct
5 interstate commerce? And I think the record clearly
6 indicates there were. The judge said, here, "There is
7 enough evidence, to fill this courtroom, of illegal acts
8 by the Respondents."

9 JUSTICE GINSBURG: But the Seventh Circuit in
10 its most recent expression said, "It may well be that the
11 judge will decide that those four predicate acts" -- as
12 opposed to 121 going in, four -- "were not sufficient to
13 support certainly a nationwide injunction, but perhaps not
14 any injunction."

15 MR. CHEMERINSKY: That's correct, Your Honor.
16 That's why it was appropriate for the Seventh Circuit to
17 remand the case to the District Court, because if the
18 court were to conclude that an injunction is not
19 appropriate, then anything that would be said about the
20 meaning of the Hobbs Act or about civil RICO would then
21 just be an advisory opinion. And that's why this Court,
22 we believe, should also send the case back to the District
23 Court. But if it reaches the meaning of the Hobbs Act or
24 civil RICO, we believe that this is a situation there the
25 plain meaning of the statute clearly controls.

1 CHIEF JUSTICE ROBERTS: Is there anything that
2 -- under your reading of the Hobbs Act, that isn't covered
3 by the FACE Act?

4 MR. CHEMERINSKY: Well, yes, Your Honor. The
5 nature of the relief is certainly different under the
6 Hobbs Act than under the FACE Act. Also, of course, at
7 the time this action was brought, 19 years ago, the FACE
8 Act didn't exist.

9 CHIEF JUSTICE ROBERTS: No, I know. But in
10 terms of the -- we now have specific legislation addressed
11 to the specific context. And all of the acts that you're
12 complaining of in the original suit are actionable under
13 the FACE Act, aren't they?

14 MR. CHEMERINSKY: That's correct, Your Honor.

15 JUSTICE BREYER: I'd like you to get to the
16 meaning of the Hobbs Act.

17 MR. CHEMERINSKY: Yes, sir.

18 JUSTICE BREYER: And I'll try to focus my own
19 thoughts on this by saying two objections to what you're
20 arguing, related, that when they passed the Hobbs Act, it
21 had a section 2, and section 2 said that, "This is an Act
22 that forbids robbery and extortion, all involving
23 interstate commerce. And robbery/ extortion involve
24 property." Then it had a section 5. And section 5 said,
25 "This Act forbids physical violence or threats of violence

1 related to section 2." Now, all that happened since then
2 is, there was a recodification. And the recodification
3 wasn't meant to change anything substantive.

4 Second and related point: Enmons. For 35 years,
5 working people in this country have thought they had a
6 right to strike, free of the Hobbs Act. And your
7 interpretation, as the AFL-CIO points out, will gut the
8 right to strike.

9 Now, those are two strong arguments against you,
10 and I'd like to hear your response.

11 MR. CHEMERINSKY: Thank you. And I'll address
12 them, first and then second.

13 As to the first point, you correctly quote the
14 1946 statute, but the 1948 revision was approved by
15 Congress, and it specifically says "robbery or extortion
16 or attempts so to do," comma, "or physical violence or
17 threats of violence." This Court has said, in cases like
18 United States versus Ron Pair, that commas have to be
19 given meaning. This Court, in many cases, such as FCC
20 versus Pacifica, said, "or" must be given meaning. There
21 is --

22 CHIEF JUSTICE ROBERTS: Well, we've also said
23 that we don't assume a substantive change from a
24 recodification.

25 MR. CHEMERINSKY: But, Your Honor -- the statute

1 has been approved by Congress. It is that which is
2 authoritative. And this Court has said, in other cases,
3 like United States versus Wells, and State Farm versus
4 Tashire, that revisors notes are often erroneous. This
5 Court has said the cardinal rule of statutory construction
6 is that the plain language must be followed.

7 CHIEF JUSTICE ROBERTS: So, your argument
8 requires us to assume that Congress intended a substantive
9 change when it recodified the Hobbs Act.

10 MR. CHEMERINSKY: That's right. This -- my
11 argument is that the plain language makes clear that
12 Congress did enact a substantive change. And, indeed, to
13 interpret the law as Petitioner suggests, would render the
14 words about "physical violence or threats of violence" as
15 mere surplusage. And so, for example, some of the
16 illustrations that were mentioned earlier, one was about
17 the possibility of a planned pride and attempt. But, in a
18 model penal code, section 5.01, it's clear that any
19 substantial step is sufficient for an attempt that --

20 CHIEF JUSTICE ROBERTS: Who -- who's enacted the
21 model penal code?

22 MR. CHEMERINSKY: I mention the model penal code
23 as just something that's regarded as an authoritative
24 definition with regard to criminal law. There's many
25 jurisdictions around the country, including at the Federal

1 level, consistently saying a substantial step is
2 sufficient for an attempt.

3 Another example that was mentioned was the
4 subordinate enforcer. Would the subordinate enforcer
5 would be likely considered part of a conspiracy or an
6 accomplice?

7 JUSTICE GINSBURG: Mr. Chemerinsky, the problem
8 that I have, and Justice Breyer expressed, is, we have the
9 revisor's notes that suggest, "I was just getting rid of
10 extra words. I was making this a tighter provision." And
11 there's not anything to indicate that Congress considered
12 any change in the substance of the Act.

13 MR. CHEMERINSKY: Your Honor, there is almost no
14 legislative history for the 1948 revision. All there is,
15 as you rightly say, is the revisor's notes. But this
16 Court has said that the revisor's notes are not
17 authoritative. And this Court has said, on so many
18 occasions, that --

19 JUSTICE GINSBURG: But here's a -- the revisor
20 telling us, "I did this, and I did this to clean up the
21 Act, to make it less wordy."

22 MR. CHEMERINSKY: Yes. But even if that's
23 regarded as authoritative, this Court has so often said
24 legislative history cannot justify ignoring plain meaning.
25 And, given the comma and the word "or" and the fact that,

1 otherwise, the words "by physical violence" would have no
2 meaning --

3 JUSTICE SCALIA: Let me --

4 MR. CHEMERINSKY: -- that's the plain meaning.

5 JUSTICE SCALIA: -- let me talk --

6 JUSTICE SOUTER: Well --

7 JUSTICE SCALIA: -- about the comma. I don't --
8 I don't -- I don't understand your argument on that point.

9 I mean, it says, "Whoever, in any way or degree,
10 obstructs, delays, or affects commerce or the movement or
11 any article or commodity in commerce by robbery or
12 extortion or attempts or conspires to do so," comma --
13 that's the comma you're talking about?

14 MR. CHEMERINSKY: Yes.

15 JUSTICE SCALIA: -- "or threatens physical
16 violence to any person or property," but it continues, "in
17 furtherance of a plan or purpose to do anything in
18 violation of this section." Now, the only thing that this
19 section has, prior to that statement, said to be a
20 violation is obstructing/delaying by robbery, extortion,
21 or attempt or conspiracy to robbery or extortion.

22 MR. CHEMERINSKY: No, Your Honor. Two points
23 here. First, it says "a plan." It's clear, there is --
24 it's a plan to obstruct, interfere, or affect commerce.
25 The others, Your Honor, you quickly skipped over --

1 JUSTICE SOUTER: No, but --

2 JUSTICE SCALIA: "Plan to do anything in
3 violation of this section," which is not just obstructing
4 commerce, but obstructing it by robbery, extortion, or
5 attempt or conspiracy to robbery or extortion.

6 MR. CHEMERINSKY: No, Your Honor. I think that
7 does deprive the comma or the word "or" meaning. And, in
8 fact, it deprives the title of meaning, because the title
9 here can be used when the title makes clear that it's
10 about violence to obstruct interstate commerce. I'd also
11 point out some words --

12 JUSTICE BREYER: But that's a jurisdictional
13 hook, isn't it?

14 JUSTICE BREYER: When you see something in a
15 criminal statute that forbids "affecting commerce by,"
16 that means that Congress wants to prevent the conduct that
17 will follow the words "by," and it needs a jurisdictional
18 hook, so it puts in "affecting commerce." That's how I've
19 always understood the Federal criminal code. Am I --

20 MR. CHEMERINSKY: Yes.

21 JUSTICE BREYER: -- wrong in that?

22 MR. CHEMERINSKY: Yes, Your Honor. Here, what
23 it's saying is that Congress is prohibiting "plans to
24 obstruct commerce by robbery or extortion or physical
25 violence or threats of violence." And, Justice Scalia,

1 when you read the statute to me, some of the words that
2 were skipped over quickly were the words "so to do."
3 Notice it says "with regard to robbery or extortion or
4 attempts to do so," comma. If they meant violence and
5 physical violence to only refer to extortion or robbery,
6 as they did with "attempt," then "so to do" could have
7 been put into that clause, as well.

8 JUSTICE SCALIA: What is -- what meaning do you
9 give to the phrase "in furtherance of a plan or purpose to
10 do anything in violation of this section"? Under your
11 interpretation, you could just drop that -- drop that
12 phrase completely.

13 MR. CHEMERINSKY: Not at all, because it makes
14 clear that Congress didn't mean, here, to criminalize
15 every act of violence that occurs. It has to be, in order
16 to be actionable, a "plan of physical violence to obstruct
17 interstate commerce." That's why this doesn't apply --

18 JUSTICE SCALIA: But that's not a violation of
19 the section. "Obstructing interstate commerce" is not a
20 violation of 1951.

21 MR. CHEMERINSKY: No, Your Honor. What is a
22 violation of 1951 --

23 JUSTICE SCALIA: -- is obstructing it by robbery
24 or by extortion or by attempt or conspiracy to robbery or
25 extortion.

1 MR. CHEMERINSKY: I disagree, because I think
2 then it does reduce the words "physical violence or
3 threats of physical violence" to mere surplusage.

4 JUSTICE O'CONNOR: Well, no, because the --

5 JUSTICE SOUTER: Well, what do you say to the
6 response --

7 JUSTICE O'CONNOR: -- the counsel for the
8 Government explained that if, in the course of committing
9 a robbery, some bystander is physically injured, it's
10 covered.

11 MR. CHEMERINSKY: No, Your --

12 JUSTICE O'CONNOR: I mean, that's
13 understandable, isn't it?

14 MR. CHEMERINSKY: No, Your Honor. The reason
15 is, if somebody is injured in the course of a robbery,
16 that's already punished as part of the robbery. In fact,
17 the Federal sentencing guidelines make clear that harms
18 that are caused while committing a crime are punished as a
19 part of that crime. You --

20 JUSTICE SCALIA: If you're --

21 MR. CHEMERINSKY: -- don't need to --

22 JUSTICE SCALIA: -- convicted --

23 MR. CHEMERINSKY: -- include that language.

24 JUSTICE SCALIA: -- of the crime, but you cannot
25 be indicted as a separate crime. This makes it a separate

1 offense.

2 MR. CHEMERINSKY: But, Your Honor --

3 JUSTICE SCALIA: You're saying we -- you can use
4 it to aggravate the punishment for some other offense, but
5 this does -- this does something quite beyond that. It
6 says it is a separate offense.

7 MR. CHEMERINSKY: But, Your Honor, for every
8 criminal law, injuries that are committed by those who are
9 engaged in the criminal activity are punished as a part of
10 that criminal act.

11 Now, Justice Breyer, your second --

12 JUSTICE SOUTER: Well, you say they are punished
13 as a part of the act, but Justice Scalia's point is still
14 true, it only goes to punishment. The way this is
15 written, it may be charged as a separate offense.

16 MR. CHEMERINSKY: But, Your Honor, there would
17 be no need to charge a separate offense. If you look at
18 1951(b) --

19 JUSTICE BREYER: Well, I -- I mean, one is --
20 I'm attempted to say, "Well, tell Congress that." If they
21 want to create a separate offense, they can do it.

22 MR. CHEMERINSKY: No, Your Honor. If you look
23 at section 1951(b), where it defines "robbery" and
24 "extortion," it already includes "violence" in the
25 definition of "robbery" and "extortion." There would be

1 no need for Congress to separately --

2 JUSTICE BREYER: But isn't the reasonable
3 reading of that, "violence in the course of achieving --
4 for the purpose of achieving the object in question," as
5 opposed to, in effect, a "by-blow against a bystander"?

6 MR. CHEMERINSKY: No, Your Honor, I don't think
7 so, since the statute defines "robbery" and "extortion,"
8 in 1951(b), specifically to include acts of violence, then
9 all the things we're talking about after the crime would
10 already be part of what's prohibited by the statute.

11 JUSTICE BREYER: Mr. --

12 MR. CHEMERINSKY: It could already be charged --

13 JUSTICE BREYER: -- I want to give you a chance,
14 because you're quite right in thinking that I'm moved, in
15 large part -- or worried, in large part -- not about this
16 language, but about the change in Federal criminal law.
17 And the change in Federal criminal law, if you're right,
18 way beyond this case, would transform virtually every
19 threat of violence made anywhere in the United States into
20 a serious Federal crime. At the least, it would -- and
21 make a major change in threats of violence on the picket
22 line. And those are two aspects of the same thing. And
23 I'm worried about the upsetting of expectations way
24 outside the context of this case and making a major change
25 in Federal labor law, for example.

1 MR. CHEMERINSKY: Let me start labor law and
2 then go more generally.

3 Section 1951(c) has a specific provision that
4 makes clear that the Hobbs Act was not meant to change the
5 protection of labor unions. And, in fact, every one of
6 the statutory references in 1951(c) is to a statute
7 protecting labor unions. Enmons specifically says --

8 JUSTICE BREYER: What does it -- 1951(c) says
9 what?

10 MR. CHEMERINSKY: It lists -- it says "nothing
11 in this statute is meant to alter the protections of," and
12 then it lists a whole number of statutes, and those are
13 all statutes that protect labor unions.

14 JUSTICE BREYER: Yeah, but I -- then perhaps I
15 -- that's an old statute, 1951(c), isn't it? Is it
16 something brand new?

17 MR. CHEMERINSKY: Well, this is the Hobbs Act.

18 JUSTICE BREYER: Yeah.

19 MR. CHEMERINSKY: Section 3 --

20 JUSTICE BREYER: All right. What is it --

21 MR. CHEMERINSKY: -- of the Hobbs Act.

22 JUSTICE BREYER: Well, the case that interpreted
23 the Hobbs Act, which is Enmons --

24 MR. CHEMERINSKY: Right.

25 JUSTICE BREYER: -- seems to rely, for the

1 labor-union exemption, on the fact that a threat of
2 violence in effort to obtain legitimate wages is not
3 within the Act. But if we read "legitimate wages" out of
4 the Act, then I guess we would be left with "the threat of
5 violence."

6 MR. CHEMERINSKY: No, Your Honor. And the
7 reason is, Enmons says there's a special legislative
8 history of the Hobbs Act specifically about labor. And
9 Enmons concluded that if the violence is part of a strike
10 to pursue lawful union activities, it is not actionable
11 under the Hobbs Act. Nothing that this Court would decide
12 here would change that specific protection of unions, one
13 that's codified in the statute.

14 As to your former question, nor would ruling in
15 favor of Respondents here change the criminal laws you
16 suggest. The statute would only apply to a plan to
17 obstruct interstate commerce by physical violence or
18 threats of violence. Your Honor, this is an
19 interpretation --

20 JUSTICE BREYER: No, the -- it's not a -- that's
21 wrong. It says "affect commerce."

22 MR. CHEMERINSKY: Right.

23 JUSTICE BREYER: And, therefore, we have the
24 instance of any threat of violence that affects commerce
25 becomes a Federal crime subject to 20 years of

1 imprisonment. And, of course, in today's world, as you
2 know, I believe almost everything affects commerce. And
3 if I'm even close to being right, this is a major
4 incursion of Federal law, serious criminal Federal law,
5 into what could be fairly minor matters of State criminal
6 law.

7 MR. CHEMERINSKY: No, Your Honor, because of the
8 importance of the word "plan." And this goes to my answer
9 to Justice Scalia earlier. The fact that it has to be a
10 plan to obstruct or affect interstate commerce is an
11 important limitation here. And it's key to remember that
12 this is the position that the United States Government
13 took for at least 25 years -- from the Franks case, in
14 1974, to the Milton case, in the Fourth Circuit in 1998,
15 the Yankowski case, in 1999 -- and it hasn't had those
16 effects. But if it does, Your Honor, then the appropriate
17 solution is for Congress to change the statute, but not
18 for this Court to ignore the plain meaning of the law.

19 The final issue that was presented concerns the
20 RICO statute. Here, section 1964(a) clearly authorizes
21 courts to have jurisdiction to issue injunctions. Unlike
22 the Sherman Act provision that only authorized Government
23 to seek injunctive relief, section 1964(a) allows Federal
24 courts of jurisdiction, in any instance. This Court has
25 said, in many instances, as Chief Justice Roberts pointed

1 out, such as Franklin versus Gwinnett County, that when
2 Federal courts have jurisdiction, they retain equitable
3 power unless Congress expressly stripped that authority.
4 So --

5 CHIEF JUSTICE ROBERTS: Well, your friend's
6 answer was that that was an implied right-of-action case;
7 and, therefore, the remedies had not been spelled out; and
8 so, you assume the broader remedies. What's wrong with
9 that answer?

10 MR. CHEMERINSKY: No, Your Honor, because this
11 Court has said, in any instance, Federal courts have
12 equitable power unless Congress has expressly stripped it
13 of that power. United States versus Umansky would be an
14 example where this Court said that, as well as the
15 language from Franklin versus Gwinnett County. And that's
16 especially true here, where Congress, in the RICO statute,
17 specifically said that it should be broadly construed.
18 This Court, in Sedima versus Imrex, said especially as to
19 the remedial provision, section 1964, this should be broad
20 construction.

21 JUSTICE GINSBURG: As you read it, can a private
22 party get a preliminary injunction?

23 MR. CHEMERINSKY: No, Your Honor, in terms of
24 the Government specifically authorized by 1964(b) to get a
25 preliminary injunction. And the reason for that is,

1 generally the Government can't get injunctions to stop
2 criminal activity. 1964(b) was added for that. But I'd
3 say 1964(a), to go to your specific question, would
4 authorize anyone to be able to go to the Federal court to
5 use any of the Federal court's inherent powers.

6 JUSTICE GINSBURG: So, a private party could get
7 an -- not only permanent, but preliminary --

8 MR. CHEMERINSKY: Yes, Your Honor.

9 JUSTICE GINSBURG: -- injunction.

10 MR. CHEMERINSKY: Yes. 1964(b) was added
11 because of the traditional common-law rule that the
12 Government generally can't get such injunctions.

13 Our position is simple. We believe that the
14 Hobbs Act was changed precisely to deal with the
15 situations where there might be a radical animal-activist
16 group that might be blowing up restaurants that serve
17 meat, or clothing stores, or where there might be
18 situations where racists were blowing up businesses owned
19 by blacks or Jews. That's what the Hobbs Act does. And
20 the RICO statute provides, as Congress intended, a broad
21 remedial scheme.

22 JUSTICE SCALIA: Mr. Chemerinsky, I -- you said
23 earlier that our -- that we "reversed and remanded." That
24 was not in our opinion, though, as it sometimes is,
25 "Therefore, you know, the case is remanded." It doesn't

1 say that. Our opinion here just says "reversed."

2 MR. CHEMERINSKY: Right. But, Your Honor, this
3 case --

4 JUSTICE SCALIA: It just says --

5 MR. CHEMERINSKY: -- obviously was sent back --

6 JUSTICE SCALIA: -- "reversed."

7 MR. CHEMERINSKY: -- to the Seventh Circuit.

8 And the Seventh Circuit then had to interpret what this
9 Court decided. And --

10 JUSTICE SCALIA: I see. And they interpreted
11 "reversed" to mean "remanded."

12 MR. CHEMERINSKY: Because this Court had not
13 considered --

14 JUSTICE SCALIA: I see.

15 MR. CHEMERINSKY: -- the four acts --

16 JUSTICE SCALIA: I see.

17 MR. CHEMERINSKY: -- of violence and threats of
18 violence.

19 JUSTICE SCALIA: So, that enabled them to say
20 that what we meant was not "reversed," but "reversed and
21 remanded."

22 MR. CHEMERINSKY: What this -- what the Seventh
23 Circuit did was look at this Court's opinion and see that
24 the statement of the issues, on page 397 --

25 JUSTICE SCALIA: They didn't look at the last

1 line of our opinion, which said "reversed."

2 MR. CHEMERINSKY: But, Your Honor, that would
3 then assume that this Court decided an issue about the
4 meaning of the Hobbs Act that was never presented in the
5 cert petitions, never briefed, never addressed in the
6 opinion.

7 JUSTICE GINSBURG: They made the assumption that
8 this Court has an obligation to reason why, and there was
9 no reason why given as to those four counts.

10 MR. CHEMERINSKY: That's right. No discussion
11 whatsoever, Your Honor.

12 JUSTICE SCALIA: It's a broad principle.
13 Whenever a Court of Appeals thinks that we haven't really
14 resolved all the issues in the case, they can ignore our
15 order that says "reversed."

16 MR. CHEMERINSKY: Of course not, Your Honor.
17 What the Seventh Circuit had to decide was, What about the
18 four counts of violence or threats of violence that were
19 found by the jury? Since they weren't ever discussed, the
20 Court of Appeals did exactly the right thing, sent it back
21 to the District Court to decide whether an injunction is
22 still appropriate; and, if so, what the Hobbs Act means.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Well, Congress never
25 discussed the change in the Hobbs Act that you're

1 proposing, in 1948.

2 [Laughter.]

3 MR. CHEMERINSKY: That's true. But it's unusual
4 that, in 1948, Congress actually passed that statute. And
5 so, that's binding. Here, the Seventh Circuit --

6 JUSTICE STEVENS: We also actually entered a
7 mandate, too.

8 [Laughter.]

9 MR. CHEMERINSKY: Yes, that's true.

10 Thank you very much.

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Chemerinsky.

13 Mr. Untereiner, you have 3 minutes remaining.

14 REBUTTAL ARGUMENT OF ALAN UNTEREINER

15 ON BEHALF OF PETITIONERS

16 MR. UNTEREINER: Thank you, Mr. Chief Justice.
17 I just want to make a few very quick points.

18 First, I heard Mr. Chemerinsky say that the
19 third clause was unnecessary in the Hobbs Act, because
20 robbery and extortion necessarily involve acts or threats
21 of violence. I just would like to point out that the
22 Hobbs Act also covers official extortion, which does not
23 require acts or threats of violence.

24 Secondly, on the Enmons point that Justice
25 Breyer was asking about, you're quite right, Justice

1 Breyer, that to accept the other side's position would
2 effectively overrule Enmons. Enmons did not rely, in any
3 way, on section 1951(c), had nothing to do with the
4 Court's analysis. If you look at section 1951(c), which
5 is reprinted in the Scheidler blue brief at page 2(a),
6 you'll see that it just refers to some labor statutes. It
7 says that the Hobbs Act is not meant to repeal, modify, or
8 affect those laws. But those laws don't protect violent
9 conduct, so that's a red herring.

10 And, number three, I'd just like to point out
11 that in this Court's last decision in this case, the Court
12 made clear that coercion is not covered by the Hobbs Act.

13 But under the Respondent's reading, some acts of coercion
14 would, in fact, be covered by the Hobbs Act.

15 Finally, we'd just like to reiterate our request
16 that, if the Court rules in our favor, it make very clear,
17 in remanding the case, that judgment should be entered in
18 favor of Petitioners.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

21 The case is submitted.

22 [Whereupon, at 11:01 a.m., the case in the
23 above-entitled matter was submitted.]

24

25